In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 2

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK ROMANO AND JOHN OTTIANO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND DISTRICT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 123–130) is reported at 330 F. 2d 566.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1964 (R. 131–132). Petitions for rehearing were denied on April 21, 1964 (R. 134–136). The time within which to file a petition for a writ of certiorari was extended to June 10, 1964 (R. 137). The petition was filed on that date and was granted on March 15, 1965 (R. 138; 380 U.S. 941). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the statutory inferences established by section 5601(b) (1) and (4) of the Internal Revenue Code are constitutionally valid.

STATUTE INVOLVED

Section 5601 of the Internal Revenue Code of 1954, as added by 72 Stat. 1398–1400, 26 U.S.C. 5601, provides in pertinent part:

> (a) OFFENSES.
>
> Any person who—
>
> (1) *Unregistered stills.*
>
> Has in his possession or custody, or under his control, any still or distilling apparatus set up which is not registered, as required by section 5179(a); or
>
> * * * * *
>
> (8) *Unlawful production of distilled spirits.*
>
> Not being a distiller authorized by law to produce distilled spirits, produces distilled spirits by distillation or any other process from any mash, wort, wash, or other material * * *.
>
> (b) PRESUMPTIONS.
>
> (1) *Unregistered stills.*
>
> Whenever on trial for violation of subsection (a)(1) the defendant is shown to have been at the site or place where, and at the time when, a still or distilling apparatus was set up without having been registered, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such

presence to the satisfaction of the jury (or of the court when tried without jury).

* * * * *

(4) *Unlawful production of distilled spirits.*

Whenever on trial for violation of subsection (a)(8) the defendant is shown to have been at the site or place where, and at the time when, such distilled spirits were produced by distillation or any other process from mash, wort, wash, or other material, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury).

STATEMENT

After a jury trial in the United States District Court for the District of Connecticut, respondents and two others (Edward Romano and Antonio Vellucci) were convicted on an indictment (R. 2–4) charging violations of the provisions of the Internal Revenue Code relating to illegal distilling operations, and of conspiracy to violate one of these provisions. Count one charged respondents with possession, custody and control of an unregistered still and distilling apparatus (26 U.S.C. 5601(a)(1)); count two, with illegal production of distilled spirits (26 U.S.C. 5601 (a)(8)); and count three, with conspiracy to produce distilled spirits illegally. Frank Romano was fined $10,000 on count one and was sentenced to concurrent three-year terms of imprisonment on the three counts. John Ottiano was fined $5,000 on count one and

sentenced to concurrent two-year terms (R. 82–85).

The court of appeals affirmed respondents' convictions on the conspiracy count, but reversed on the substantive counts, holding that the inferences created by section 5601(b) (1) and (4), on which the jury was charged, were unconstitutional (R. 123–130; 330 F. 2d 566).[1]

The evidence showed that in the late evening of October 10, 1960, agents of the Alcohol and Tobacco Tax Division of the Internal Revenue Service went to the site of a large industrial complex in Jewett City, Connecticut, at which an illegal distilling operaton was reportedly being conducted. After entering the premises through a hole in a fence and proceeding down an alleyway, the agents detected the distinct odor of fermenting mash emanating from a building, known as 9A, which was located in the northwest corner of the site. They then departed by the same route they had come. Earlier that evening, another agent, posted on high ground overlooking the site and using binoculars, had scanned the interior of building 9A and seen a column still and other materials used in the distillation of alcohol (R. 124–125). The next day, on the basis of these observations, the federal agents obtained a search warrant for building 9A. Upon executing the warrant, they found a 753-gallon still in full operation, and 9 mash vats containing approximately 5,756 gallons of mash. Ad-

[1] The court affirmed the convictions of all four defendants on the conspiracy count and of Edward Romano and Antonio Vellucci on the substantive count in which they were named (count two); under the judge's charge, the presumptions were not applicable to respondents' co-defendants.

ditional paraphernalia used in the distillation process (*e.g.*, hundreds of glass jugs and numerous bags of sugar) were also discovered on the premises (R. 17–20, 30–33, 39–41; see R. 125). The respondents were found inside the building standing a few feet from the operating still (R. 64–65). In Ottiano's pocket, the agents found the keys to the doors of the building. Both men informed the agents that they did not know how long the still had been in operation, Romano adding that he had been at the premises for three days. Romano showed the agents how to turn off the still motor (R. 6–14, 29).

The trial judge instructed the jury, *inter alia*, that they were "the sole judges of the facts" (R. 91); that "[t]he law presumes a defendant to be innocent of crime" and that this presumption "alone is sufficient to acquit a defendant, unless the Jurors are satisfied beyond a reasonable doubt of the defendant's guilt from all the evidence in the case" (R. 92); that "the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged" (R. 93); and that, as to "any presumption that is referred to in the Court's charge, you will consider that presumption in the light of all of the evidence which has been offered in arriving at a conclusion, keeping always in mind that it is the burden of the Government to prove beyond a reasonable doubt the guilt of each accused" (R. 95). The trial court then instructed the jury as to the inferences established by 26 U.S.C. 5601(b) (1) and (4) (*supra*, pp. 2–3), indicating that they were limited to the first two substantive

counts and to the defendants (Frank Romano and John Ottiano) who were found at the illegal still by the arresting officers (R. 100–102).

In holding the statutory inferences unconstitutional the court of appeals relied upon the Fifth Circuit decision in *Barrett* v. *United States*, 322 F. 2d 292, which was subsequently reversed by this Court *sub nom. United States* v. *Gainey*, 380 U.S. 63. It found that each statutory inference "is too strained and is not reasonably related to the fact proved" (R. 129). The court concluded (R. 130):

> We find that the presumptions set out in §§ 5601(b) (1) and (4) fall outside the constitutional power of Congress. There is no broad ground of experience which supports the conclusion that people present at a still site are in possession or control of the distilling operation on that site in such a large proportion of such instances that a jury may be instructed that it may draw such a conclusion in the absence of any explanation.

ARGUMENT

INTRODUCTION AND SUMMARY

In *United States* v. *Gainey*, 380 U.S. 63, this Court, last Term, sustained the constitutionality of one of five statutory inferences (or "presumptions") added in 1958 to the alcohol tax laws. The provision[2] upheld in *Gainey* permits a jury to convict of the crime of carrying on the business of a distiller without bond[3] if it finds that the defendant was present at the place

[2] 26 U.S.C. 5601(b)(2).
[3] 26 U.S.C. 5601(a)(4).

where and the time when the business of a distiller was being carried on, and his presence is not satisfactorily explained. Also challenged in that case—as here—was a closely related statutory inference[4] which, in similar circumstances, authorizes conviction of possession, custody, or control of an unregistered set-up still.[5] The Court did not reach the constitutionality of the latter provision, however, since concurrent sentences had been imposed on the *Gainey* defendants. The same question is unavoidably presented in the instant case since the fines imposed on both respondents were based on illegal possession alone. This case further involves the constitutionality of another closely related provision[6] which permits guilt of the crime of unauthorized production of distilled spirits[7] to be inferred from the defendant's unexplained presence at the site of an illegal still when distilled spirits are being produced.

The constitutionality of the last-cited provision is established by the principles of the *Gainey* decision, which held that a statutory inference of guilt under

[4] 26 U.S.C. 5601(b)(1).

[5] 26 U.S.C. 5601(a)(1). A still is "set up" under the statute when, although some minor adjustment may be necessary, it is essentially capable of immediate operation. See *Guy* v. *United States*, 336 F. 2d 595 (C.A. 4); *United States* v. *Moses*, 205 F. 2d 358, 359 (C.A. 2); *Otto* v. *United States*, 29 F. 2d 504, 505 (C.A. 7); *United States* v. *Cafero*, 55 F. 2d 219, 220 (C.A. 2); *Colasurdo* v. *United States*, 22 F. 2d 934, 935 (C.A. 9). Unless a still is "set up" within these standards, the registration requirements of the statute do not apply. *Liverman* v. *United States*, 260 F. 2d 284, 286 (C.A. 4).

[6] 26 U.S.C. 5601(b)(4).

[7] 26 U.S.C. 5601(a)(8).

the alcohol tax laws based on the unexplained presence of the defendant is rational, and hence constitutional, if the offense is sufficiently broad as to encompass everyone to whom the inference is at all likely to be applicable. We show in Part I of our Argument that the offense of unauthorized production is as comprehensive as the offense of engaging in the business of a distiller without bond at those times when the illegal still is actually in operation, and that the statutory inference, which applies to unexplained presence at those times and no others, is therefore exactly comparable to and no less rational than the inference involved in *Gainey*. We urge, indeed, that there is even stronger reason to infer illegal production from unexplained presence when the still is running, than there is to infer engagement in the business of an unauthorized distiller from unexplained presence at an illegal still regardless of whether it is running when the defendant is found; strangers to the illegal enterprise are even less likely to be present during the actual runs when alcohol is being produced than during periods when the still is idle.

The constitutionality of the inference relating to the offense of unauthorized *possession* raises somewhat more difficult questions, in view of the ruling in *Bozza* v. *United States*, 330 U.S. 160, 163–164, which narrowly defines this offense. However, we argue in Point II that the 1958 amendments, which added the inferences here challenged and which we demonstrate were intended to overrule this Court's decision in *Bozza*, may fairly be read to have implicitly redefined the offense of unauthorized possession, broadening it

sufficiently so that the statutory inference relating to possession is constitutional under the principles of *Gainey*. We submit that such a construction, which is a reasonable interpretation of Congress' basic purpose, should be adopted by this Court to avoid the drastic step of annulling an Act of Congress.

Finally, in Part III we show that the trial judge's instructions to the jury were adequate under *Gainey*, and infringed no right of either respondent.

I

THE STATUTORY INFERENCE SET FORTH IN SECTION 5601 (b)(4) IS CLEARLY CONSTITUTIONAL UNDER THE PRINCIPLES ANNOUNCED IN THE *GAINEY* DECISION

In upholding the constitutionality of the statutory inference that permits conviction of carrying on the business of an unauthorized distiller to be based on the defendant's unexplained presence at the site where and the time when such business was being carried on, this Court, in *Gainey*, emphasized the breadth of the offense, describing the provision as "one of the most comprehensive of the criminal statutes designed to stop the production and sale of untaxed liquor." *United States* v. *Gainey*, 380 U.S. 63, 67. It is committed not only by the owner or operator of the illegal enterprise, but by suppliers, purchasers, haulers, and helpers of all kinds—by everyone, in fact, who is not a stranger to the enterprise. The likelihood that a stranger would be present at an illegal still is very remote, since "moonshiners," for obvious reasons of security, take the most elaborate precautions to keep strangers away from it. Therefore, the Court con-

cluded, the statutory inference gives the fact of unexplained presence at the site of an illegal still no more than its natural probative weight (380 U.S. at 71).

The statutory inference that we are concerned with here—which permits guilt of the offense of unauthorized production to be inferred from unexplained presence at the site of an illegal still when, but only when, alcohol is being produced—is constitutional under identical reasoning. The offense of unauthorized production—at least, during periods when the still is in actual operation producing alcohol—is no less comprehensive than that of carrying on the business of an unauthorized distiller.[8] The sole difference is that the offense of carrying on the business of an unauthorized distiller is committed both during runs and between runs, while the offense of unauthorized production is committed only during runs. During runs the latter offense encompasses just as many persons as the former: anyone who has any connection with the illegal enterprise while production is actually taking place is guilty of unauthorized production either as principal or accessory—purchasers, suppliers, haulers, watchmen, lookouts, etc.[9] Since the statutory in-

[8] The probable explanation of why Congress made carrying on and production separate offenses is that the former is intended to provide a criminal penalty for breach of 26 U.S.C. 5173, which requires a distiller to post a bond, and the latter a criminal penalty for breach of 26 U.S.C. 5171(b), which requires him to obtain an operating permit before distilling begins.

[9] See *DeGregorio* v. *United States*, 7 F. 2d 295, 296 (C.A. 2); *Occinto* v. *United States*, 54 F. 2d 351, 353 (C.A. 8); and *United States* v. *Stappenback*, 61 F. 2d 955, 957 (C.A. 2), where

ference relating to the offense of unauthorized production is operative only with respect to persons present during runs,[10] and since it is at least as likely that a person found at the site of an illegal still during runs is guilty of unauthorized production as that a person found present between runs is guilty of carrying on the business of an unauthorized distiller, section 5601(b)(4) is no less rational than 5601(b)(2), upheld in the *Gainey* decision.

Its constitutionality, indeed, follows from that decision *a fortiori*. For whatever security measures may be taken between runs to keep away the innocent passerby are bound to be increased (*e.g.*, by the posting

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the courts implicitly so held on the facts, although finding it unnecessary to deal specifically with the issue. In *Bozza* v. *United States*, 330 U.S. 160, where the defendant was charged in count one with carrying on the business of making distilled spirits with intent to defraud the United States (see 155 F. 2d 592), the Court made no distinction between unauthorized production and unauthorized carrying on in upholding the conviction on count one. Evidence that the petitioner helped the operator work the still and manufacture the alcohol in addition to aiding him in the delivery of the finished product (330 U.S. at 163), which was held sufficient to support the conviction for carrying on the business, was also held sufficient to show unauthorized production. And the dissenting opinion, which considered the evidence insufficient to show intent to defraud, noted that proof of such intent was different from proof of "[a]iding and abetting in the illicit *manufacture* of liquor" (330 U.S. at 168; emphasis added).

[10] Presence at a set-up still, even though there is evidence of a going business, is not enough to trigger into operation the inference embodied in section 5601(b)(4); the still must be actually operating and liquor must be being produced for the inference to come into play. So in this case, it was only because petitioners were found in the building containing a 753-gallon still in *full operation* that the presumption was held to apply (see Statement, p. 4, *supra*).

of additional lookouts) when the still is actually running. It is at that time, when production is taking place and the distinctive odor of fermenting mash is perceptible (see Statement, p. 4, *supra*; R. 126), that testimony by observers could provide the most damaging evidence of guilt. The Court's observations in *Gainey*, "that manufacturers of illegal liquor are notorious for the deftness with which they locate arcane spots for plying their trade," and "that strangers to the illegal business rarely penetrate the curtain of secrecy" (380 U.S. at 67–68), provide especially cogent support for a statutory inference from unexplained presence that does not come into play unless actual production—the heart of the business—is taking place.

II

THE STATUTORY INFERENCE SET FORTH IN SECTION 5601(b)(1) IS CONSTITUTIONAL IF, CONSISTENTLY WITH THE BASIC LEGISLATIVE PURPOSE, THE OFFENSE OF UNAUTHORIZED POSSESSION IS GIVEN A BROAD CONSTRUCTION

Count one of the indictment (R. 2) charged the defendants under section 5601(a)(1), which declares guilty of a criminal offense any person who—

> Has in his possession or custody, or under his control, any still or distilling apparatus set up which is not registered * * *.

Section 5601(b)(1) provides that proof that the defendant was "at the site or place where, and at the time when, a still or distilling apparatus was set up [11] without having been registered" shall be sufficient

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11 See note 5, *supra*.

evidence to authorize conviction unless the defendant's presence is explained to the satisfaction of the jury.

The basic plan of Congress in the alcohol tax laws is clear. It is to make criminal every meaningful form of participation in, or assistance to, the operation of an illegal still by an elaborate pattern of partially redundant provisions—some specific and some general—designed to close all loopholes. Thus, the owner or operator of an illegal still violates at least eleven criminal provisions.[12] In *Bozza* v. *United States*, 330 U.S. 160, 163–164, this Court, on the government's confession of error, gave the substantive offense of unauthorized possession a narrow construction. It held that while such an offense as carrying on the business of an unauthorized distiller embraced a broad class, the offense of possession could not be extended beyond those who had the actual "custody or possession" of the still or acted in some "other capacity calculated to facilitate the custody or possession, such as, for illustration, service as a caretaker, watchman,

[12] Possessing an unregistered still (§ 5601(a)(1)); engaging in the business of a distiller without having applied for registration (§ 5601(a)(2)); carrying on the business of a distiller without having posted the required bond (§ 5601(a)(4)); making mash on premises other than a licensed "distilled spirits plant" (§ 5601(a)(7)); unauthorized production of distilled spirits (§ 5601(a)(8)); bottling spirits with knowledge that the tax due has not been paid (§ 5601(a)(11)); unauthorized removal of distilled spirits from the place of manufacture (§ 5601(a)(12)); carrying on the business of a distiller with intent to defraud the United States of the tax due (§ 5602); possessing, selling and transferring spirits in unstamped containers (§ 5604(a)(1)); engaging in distilling without displaying the required sign (§ 5681(a)); and possessing liquor and property used or intended for use in violation of the alcohol tax laws (§ 5686(a)).

lookout, or in some similar capacity.'" If *Bozza* is still authoritative on the definition of the offense, then an inference from the mere fact of presence at an illegal still that the defendant committed acts constituting this substantive crime may very well be too tenuous to satisfy the requirement of rational connection as defined in *Gainey*. Bozza himself, who was found on the premises of an operative still, was a workman aiding in the operation but neither having nor aiding possession or custody in the narrow sense that the Court deemed intended by the statute. To impose such an inference might also be thought to place an unjust burden upon the defendant, since to give the most likely explanation of presence consistent with innocence under section 5601(a)(1) he would have to admit his guilt of crimes under other provisions of the alcohol tax laws (see the government's brief in *Gainey*, No. 13, O.T. 1964, pp. 18, 22–26, 33).

We submit, however, that Congress in the 1958 amendments overruled the narrow definition given to "possession" in *Bozza* and redefined the substantive crime, broadening it to include within its scope all those present at a set-up still who have any connection with the illicit enterprise. But cf. *McFarland* v. *United States*, 273 F. 2d 417, 419 (C.A. 5).

It is true that in language and form the amendments added only the inference (section 5601(b)(1))

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[13] This was the First Circuit's view in holding the "possession" presumption (26 U.S.C. 5601(b)(1)) unconstitutional in *Pugliese* v. *United States*, 343 F. 2d 837. The government did not file a petition for a writ of certiorari in *Pugliese* because there was a substantial doubt whether the defendant in that case was actually "present" at the still within the intendment of section 5601(b)(1).

and left untouched the definition of the substantive offense (section 5601(a)(1)). But "possession" (and the other operative terms, "custody" and "control") are not defined in the statute. And their meaning must be derived not only from the words of section 5601(a)(1) but from its context and other evidence of congressional intent, for, as Judge Learned Hand observed, there "is no surer way to misread any document than to read it literally." *Guiseppi* v. *Walling*, 144 F. 2d 608, 624 (C.A. 2) (concurring opinion). This Court has expressly held that a statutory provision "reenacted *in haec verba*" as part of a comprehensive legislative revision may "be deemed expanded in its new context * * *." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 346. The legislative history of the 1958 amendments to the alcohol tax laws is explicit that the provisions in suit here were "designed to avoid the effect of [this Court's] holding [in *Bozza* v. *United States*] as to future violations." S. Rep. No. 2090, 85th Cong., 2d Sess., p. 189; H. Rep. No. 481, 85th Cong., 1st Sess., p. 175.[14]

[14] These Reports relate to the many changes worked by the Excise Technical Changes Act of 1958 and focus only briefly on the new statutory presumptions added. In identical language borrowed from an analysis prepared by the Alcohol and Tobacco Tax Division of the Internal Revenue Service (see *Hearings Before a Subcommittee of the House Committee on Ways and Means on Excise Tax Technical and Administrative Problems*, Part I, 84th Cong., 1st Sess., p. 208; see also *Hearings*, *id.*, Part III, p. 95), the relevant portions of the House and Senate reports read:

"* * * These paragraphs are new. Their purpose is to create a rebuttable presumption of guilt in the case of a person who is found at illicit distilling or rectifying premises, but who, because of the practical impossibility of proving his actual

The only way this basic intent can be effectuated without raising very grave constitutional questions is to give "possession" an expanded reading in its new context, to embrace all those connected with the illegal enterprise.[16] This done, the constitutionality of the statutory inference of guilt of unauthorized possession from unexplained presence at a set-up unregistered still follows from *Gainey*.

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participation in the illegal activities except by inference drawn from his presence when the illegal acts were committed, cannot be convicted under the ruling of the Supreme Court in *Bozza* v. *United States* (330 U.S. 160).

"The prevention of the illicit production or rectification of alcoholic spirits, and the consequent defrauding of the United States of tax, has long been rendered more difficult by the failure to obtain a conviction of a person discovered at the site of illicit distilling or rectifying premises, but who was not, at the time of such discovery, engaged in doing any specific act.

"In the *Bozza* case, the Supreme Court took the position that to sustain conviction, the testimony 'must point directly to conduct within the narrow margins which the statute alone defines.' These new provisions are designed to avoid the effect of that holding as to future violations."

[16] A somewhat similar contention was rejected in *Tot* v. *United States*, 319 U.S., 463, 472, partly on the ground that it did not jibe with the legislative purpose. There, the government's argument was that, since Congress might have prohibited the possession of firearms by ex-felons, whether or not acquired in interstate commerce, there could be no objection to a mere presumption that the weapon was purchased from interstate commerce. Pointing out that this reasoning, in any event, did not support the presumption of acquisition after the effective date of the act, the Court added: "it is plain that Congress, for whatever reason, did not seek to pronounce general prohibition of possession by certain residents of the various states of firearms in order to protect interstate commerce, but dealt only with their future acquisition in interstate commerce." The critical difference here is that in the present instance congressional intent to broaden the offense is plain.

This construction does no violence to the language of the statute. The terms "possession," "custody" and "control" are broad enough to permit a construction under which all those connected with the business of an unauthorized distiller are guilty either as principals, aiders or abettors of the substantive crime of unauthorized possession, custody or control of a set-up still.[16] Nor is such a construction unreasonable because it results in partially overlapping prohibitions; that is, as we have seen, a characteristic of the criminal penalty provisions of the alcohol tax laws (see p. 13 and n. 12, *supra*). On the contrary, by adopting such a construction this Court, without annulling an Act of Congress, can give effect to Congress' overriding purpose in establishing this intricate structure of complementary [17] and sometimes overlapping criminal penalty provisions—to ensure that no one connected with the illegal enterprise escapes punishment by reason of a loophole in the law or the practical impossibility of proving all the elements of a particu-

[16] Cf. *United States* v. *Rappy*, 157 F. 2d 964, 966–967 (C.A. 2, L. Hand, J.), certiorari denied, 329 U.S. 806; *United States* v. *Santore*, 290 F. 2d 51, 76–78 (C.A. 2), certiorari denied, 365 U.S. 834. To establish guilt of aiding and abetting in the illegal possession of narcotics, "it was not necessary that each of the defendants should have had the narcotics, but only that one or more of them had possession while the others aided in the illicit transaction to which that possession was incidental." *United States* v. *Cohen*, 124 F. 2d 164, 165 (C.A. 2), certiorari denied *sub nom. Bernstein* v. *United States*, 315 U.S. 811.

[17] The purpose of making unauthorized possession a distinct separate offense is evidently to provide a criminal penalty for breach of 26 U.S.C. 5171(a) and 5179, which require a distiller to register his still. Compare n. 8, p. 10, *supra*. In view of Congress' intent

lar substantive offense. Nor can there by any real claim of surprise. Everyone knows (or is presumed to know) that involvement with an illicit still is a criminal offense. Adequate warning has been given. That the crime is now termed "possession" does not invalidate the notice.

III

THE TRIAL JUDGE'S INSTRUCTIONS TO THE JURY WERE ADEQUATE UNDER THE STANDARDS SET FORTH BY THIS COURT IN *GAINEY*

This Court in *Gainey*, in holding that the trial judge's instructions were not improper (see 380 U.S. at 69–70), noted that "[t]he jury was * * * specificially told that the statutory inference was not conclusive" (*id.* at 70). Here, too, the trial judge made clear that as to "any presumption that is referred to in the Court's charge, you will consider that presumption in the light of all of the evidence which has been offered in arriving at a conclusion, keeping always in mind that it is the burden of the Government to prove beyond a reasonable doubt the guilt of each accused" (R. 95, see Statement, p. 5, *supra*); he told the jury only that they "*may* consider" the statutory inferences (R. 100; emphasis added); and he gave far less emphasis to the statutory inferences

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to punish each step of the operation of an illegal distilling business separately, no problem is presented by cumulative penalties for committing more than one offense. Cf. *Gore* v. *United States*, 357 U.S. 386. We note also that the sentences imposed in the present case under both substantive counts were together less than the maximum punishment that could have been imposed under either count.

in his instructions than the trial judge in *Gainey*.[18] The instructions were adequate in all other respects as well.[19]

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the court of appeals setting aside respondents' convictions on counts 1 and 2 should be reversed.

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[18] The only express references are at R. 100 and R. 102; see also R. 95. Compare 380 U.S. at 69–70.

[19] In *Gainey*, the Court held that the trial judge's reference to the defendant's failure to explain his presence satisfactorily was not, in the circumstances, a comment on petitioner's failure to testify. 380 U.S. at 70–71. Here it is even clearer that such reference was not intended or likely to be so understood, since the reference was made only in the course of the judge's reading to the jury the provisions of the statutory inferences.

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